A **WONG YEE BOON v. GAINVEST BUILDERS (M) SDN BHD**

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
ZAHARAH IBRAHIM CJ (MALAYA)
AZAHAR MOHAMED FCJ
B ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
[CIVIL APPEAL NO: 02(f)-120-10-2017(W)]
20 NOVEMBER 2019

C ***CONTRACT:*** *Agreement – Claim for payment – Appellant engaged by respondent to procure sub-contract work from main sub-contractor – Appellant's quotation rejected by main sub-contractor – Respondent directly dealt with main sub-contractor and secured sub-contract works – Whether appellant entitled to payment under agreement – Whether appellant fulfilled obligation under agreement –* D *Whether agreement illegal – Contracts Act 1950, s. 24(e)*

CONTRACT: *Illegality – Agreement – Appellant engaged by respondent to procure sub-contract work from main sub-contractor – Whether agreement involved influence peddling – Whether influence peddling used on private entity – Whether agreement in contravention of public policy – Whether agreement engendered* E *corruption – Whether agreement illegal – Contracts Act 1950, s. 24(e)*

Pembinaan BLT Sdn Bhd, a wholly owned subsidiary of the Ministry of Finance, was appointed as the implementer of a Government project to construct an additional building for Ibu Pejabat Polis Kontinjen Kuala Lumpur ('project'). Pembinaan BLT awarded the main contract for the F whole project to Mitisa Holding Sdn Bhd ('Mitisa') and Mitisa appointed CRBC (M) Holdings Sdn Bhd ('CRBC') as the main sub-contractor. The respondent was a construction company and a class A contractor and was interested to bid for the sub-contract for structural concrete works. The appellant represented to the respondent that he had some influence and G connection with CRBC to enable the respondent to be engaged by CRBC to perform some of the sub-contract works. The respondent subsequently issued a letter appointing the appellant as an introducer and the terms of engagement between them were expressed in the introducer agreement. By virtue of the agreement, the appellant was to assist the respondent in securing the said H project as a sub-contractor from CRBC. Under cl. 3 of the introducer agreement, the respondent was obliged to submit a quotation in relation to the sub-contract works under the project to the appellant ('first quotation') and the quotation would be revised by the appellant for onward submission to CRBC to bid for the sub-contract works ('second quotation'). Pursuant to I cl. 6, the appellant would be paid the differential sum between the quotation

prepared by the respondent with the one revised by the appellant as consideration under the agreement. Clause 5 provides that the validity of the introducer agreement 'shall be dependent on the award of the project to the respondent by the contractor.' The revised quotation was submitted to CRBC, but CRBC rejected the bid of the respondent made through the revised quotation. The respondent protested and wrote to the appellant to complain that his representation of having the necessary connection with CRBC was false and that the management of CRBC had also informed them denying the relationship. Accordingly, the respondent terminated the introducer agreement. Subsequently, through direct communication between the respondent and CRBC, the respondent was awarded the whole of the sub-contract works by CRBC in the sum of RM61,688,966.25 which was subsequently reduced to RM58.6 million. The claim of the appellant against the respondent was for the payment due and owing pursuant to cl. 6 of the introducer agreement. The High Court dismissed the claim as the introducer agreement was found to be an illegal contract pursuant to s. 24 of the Contracts Act 1950 ('Act'). The appellant's appeal to the Court of Appeal was also dismissed for the same reason. Hence, the appellant obtained the leave of court to determine the question of law as to whether the principle of law espoused in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* ('*Merong Mahawangsa*'), *ie*, that 'an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s. 24(e) of the Act and is therefore void', *ie*, the *Merong Mahawangsa* principle, extends and/or applies to private arrangement between private parties.

Held (dismissing appeal with costs; declining to answer leave question)
Per Azahar Mohamed FCJ (for the majority):

(1) Several first and second quotations were prepared in the course of the exercise and finally the respondent produced its revised quotation for the total contract sum of RM31,093,478.15 for the sub-contract work. The appellant then revised the respondent's quotation by marking it up to RM35,369,505.25. This then became the final agreed version of the second quotation between the parties. However, the second quotation submitted for the sub-contract for structural concrete works was rejected. Therefore, the appellant failed to fulfil his obligation under the agreement and there was no payment to be made as per the workings and sum in cl. 6. (paras 19-22)

(2) CRBC awarded the sub-contract for the whole works comprised in the project to the respondent for the contract sum of RM58.6 million through direct communication between CRBC and the respondent to the exclusion of the appellant. There was no 'second quotation' marked up by the appellant. The letter of award to the respondent was not issued pursuant to the appellant's effort under the agreement. (paras 23-27)

(3) Upon the termination by Mitisa of CRBC as the main sub-contractor, the respondent was appointed as the main sub-contractor for the project for a provisional contract sum of RM80,713,699.75. This was an entirely new scope of works and role undertaken by the respondent. The appellant was not involved and there was no marked up 'second quotation'. The respondent was awarded this contract by its own effort and not through the effort of the appellant pursuant to the agreement. Therefore, the appellant was not entitled to any payment as claimed under the agreement and the respondent had no obligation to pay any sum to the appellant under the agreement. (paras 29-31)

Per Rohana Yusuf FCJ (dissenting):

(1) The underlying public policy in *Merong Mahawangsa* merely related to public policy where the sale of influence peddling was directly on the public authority to obtain a Government contract. An agreement by way of sale in public office tend to prejudice the public service by interfering with the selection of the best-qualified persons or services. Such sales are, therefore, unlawful and void. However, it is never the duty of a judge to speculate or opine on the pros and cons of influence peddling over a private party to obtain a private contract, because it is within the domain of the Legislature to determine and to provide for it by proper enactments. The respondent had not established what was the clear and harmful effect that could be deduced from such an act of circumventing the tender process. Unlike *Merong Mahawangsa*, it could not be inferred that the introducer agreement may engender corruption, or any other clear harmful effect on the Malaysian public. (paras 91, 93 & 96)

(2) The Court of Appeal was in clear error in invoking public policy to invalidate the introducer agreement on both aspects. First, the alleged influence peddling was not supported by clear evidence as required in the test propounded by *Merong Mahawangsa* and the alleged public policy against influence peddling in this case, was not indisputable and not established as absolutely harmful to the Malaysian public. Therefore, the introducer agreement could not be invalidated under s. 24(e) of the Act. There was thus no basis to rely on the principle of law on public policy as established in *Merong Mahawangsa* to hold that the introducer agreement was illegal. (para 98)

(3) The relationship between parties started when the appellant made his first contact with CRBC, discovered about the project and then approached the respondent. Thereafter, the appellant continued to work with the respondent which led to a revision of the first quotation prepared by the respondent. Therefore, the appellant was the point of contact to the respondent in dealing with CRBC and it was the appellant

who communicated with CRBC on behalf of the respondent and worked on the second quotation with CRBC. Further, it was admitted by the respondent's witness that, before the appellant came into the picture, he had never submitted or bid for structural work to CRBC, not being aware of the project. (paras 109, 110 & 113)

(4) The issuance of the letter of intent by CRBC to the respondent had fulfilled what cl. 5 contemplated. All the appellant needed to show was that the contract work was awarded to the respondent. Since the letter of intent was issued, the respondent then communicated directly with CRBC to the exclusion of the appellant. The respondent did not update the appellant of any further progress. When the purported letter rejecting the second quotation was issued, the respondent did not even notify the appellant to enable any remedial measure to be taken. Subsequently, the respondent, on its own, submitted a new quotation of RM61,688,966.25 for structural and architectural works without any notice to the appellant since they were then in direct communication with each other. The respondent had bypassed the appellant and directly dealt with CRBC to avoid payment under the introducer agreement. (paras 115-117)

(5) There was nothing in the introducer agreement that could be construed that the appellant guaranteed the sub-contract would be awarded to the respondent by CRBC. The appellant's obligation under cl. 4 was to only assist in securing the award of the project to the respondent by CRBC, which the appellant had fulfilled. Clause 5 had already been fulfilled when the respondent was given the letter of intent. Even though the respondent ultimately secured the project for a sum of approximately RM58.6 million, it was not disputed that the contract awarded included the structural works which was the subject matter of the introducer agreement. Thus, the amount to be paid to the appellant was in accordance with cl. 7(c) and not cl. 6. The appellant was thus entitled to the difference between the first quotation and the actual sum awarded to the respondent for the structural work only. (paras 119-122 & 126)

Bahasa Malaysia *Headnotes*

Pembinaan BLT Sdn Bhd, sebuah anak syarikat milik penuh Kementerian Kewangan, dilantik sebagai pelaksana projek Kerajaan untuk membina bangunan tambahan untuk Ibu Pejabat Polis Kontinjen Kuala Lumpur ('projek'). Pembinaan BLT mengawardkan kontrak utama keseluruhan projek tersebut kepada Mitisa Holding Sdn Bhd ('Mitisa') dan Mitisa melantik CRBC (M) Holdings Sdn Bhd ('CRBC') sebagai sub-kontraktor. Responden adalah syarikat pembinaan dan kontraktor kelas A dan berminat membida untuk sub-kontrak untuk kerja-kerja konkrit struktur. Perayu menyatakan pada responden dia mempunyai pengaruh dan hubungan dengan

CRBC untuk membolehkan responden dilantik CRBC untuk melaksanakan beberapa kerja sub-kontrak tersebut. Responden kemudian mengeluarkan surat melantik perayu sebagai pencadang dan terma-terma lantikan antara mereka dinyatakan dalam perjanjian pencadang. Menurut perjanjian tersebut, perayu akan membantu responden mendapatkan projek tersebut sebagai sub-kontraktor daripada CRBC. Bawah kl. 3 perjanjian pencadang, responden bertanggungjawab mengemukakan sebut harga berkaitan kerja-kerja sub-kontrak bawah projek tersebut kepada perayu ('sebut harga pertama') dan sebut harga itu akan disemak oleh perayu untuk dikemukakan seterusnya kepada CRBC untuk bidaan kerja-kerja sub-kontrak ('sebut harga kedua'). Menurut kl. 6, perayu akan membayar jumlah perbezaan antara sebut harga yang disediakan oleh responden dengan yang disemak oleh perayu sebagai balasan bawah perjanjian tersebut. Klausa 5 memperuntukkan bahawa keesahan perjanjian pencadang 'shall be dependent on the award of the project to the respondent by the contractor.' Sebut harga yang disemak dikemukakan kepada CRBC tetapi CRBC menolak bidaan responden yang dibuat melalui sebut harga yang disemak itu. Responden membantah dan menulis kepada perayu mengadu bahawa pernyataannya tentang hubungan dengan CRBC adalah palsu dan pentadbiran CRBC juga menafikan hubungan tersebut. Dengan itu, responden menamatkan perjanjian pencadang. Kemudian, melalui komunikasi langsung antara responden dan CRBC, responden diawardkan keseluruhan kerja-kerja sub-kontrak atas jumlah RM61,688,966 yang kemudian dikurangkan pada RM58.6 juta. Tuntutan perayu terhadap responden adalah untuk bayaran tertunggak dan terhutang menurut kl. 6 perjanjian pencadang. Mahkamah Tinggi menolak tuntutan tersebut kerana perjanjian pencadang didapati kontrak tidak sah menurut s. 24 Akta Kontrak 1950 ('Akta'). Rayuan perayu ke Mahkamah Rayuan juga ditolak atas alasan sama. Oleh itu, perayu memperoleh kebenaran mahkamah untuk mempertimbangkan soalan undang-undang sama ada prinsip undang-undang yang dinyatakan dalam kes *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* ('*Merong Mahawangsa*'), iaitu, satu perjanjian untuk memberi perkhidmatan untuk mempengaruhi keputusan pembuat keputusan awam untuk mengawardkan satu kontrak adalah kontrak yang bertentangan dengan polisi awam seperti yang ditakrifkan bawah s. 24(e) Akta dan oleh itu, terbatal, iaitu, prinsip *Merong Mahawangsa* dilanjutkan dan/atau terpakai untuk urusan antara pihak-pihak persendirian.

Diputuskan (menolak rayuan dengan kos; menolak daripada menjawab soalan kebenaran)

Oleh Azahar Mohamed HMP (kes majoriti):

(1) Beberapa sebut harga pertama dan kedua disediakan sepanjang pelaksanaan dan akhirnya responden mengemukakan sebut harganya yang disemak untuk jumlah penuh kontrak RM31,093,478.15 untuk kerja-kerja sub-kontrak tersebut. Perayu kemudian menyemak sebut

harga tersebut dengan meninggikannya pada RM35,369,505.25. Ini kemudian menjadi versi sebut harga kedua terakhir yang dipersetujui antara pihak-pihak. Walau bagaimanapun, sebut harga kedua yang dikemukakan untuk sub-kontrak untuk kerja-kerja konkrit struktur ditolak. Oleh itu, perayu gagal memenuhi tanggungjawabnya bawah perjanjian tersebut dan tiada bayaran yang perlu dibuat menurut pernyataan dan jumlah dalam kl. 6.

(2) CRBC mengawardkan sub-kontrak untuk keseluruhan kerja-kerja dalam projek tersebut kepada responden untuk jumlah kontrak RM58.6 juta melalui perbincangan langsung antara CRBC dan responden dengan mengecualikan perayu. Tiada 'sebut harga kedua' yang dinaikkan oleh perayu. Surat award kepada responden tidak dikeluarkan berikutan usaha perayu bawah perjanjian tersebut.

(3) Selepas penamatan CRBC oleh Mitisa sebagai sub-kontraktor, responden dilantik sebagai sub-kontraktor utama untuk projek untuk jumlah kontrak sementara RM80,713,699.75. Ini keseluruhannya adalah skop kerja dan peranan baru yang diterima oleh responden. Perayu tidak terlibat dan tiada 'sebut harga kedua' yang ditinggikan harganya. Responden diawardkan kontrak ini atas usahanya sendiri dan bukan melalui usaha perayu menurut perjanjian tersebut. Oleh itu, perayu tidak berhak menerima apa-apa bayaran seperti yang dituntut bawah perjanjian dan responden tidak berkewajipan membayar apa-apa jumlah kepada perayu bawah perjanjian tersebut.

Oleh Rohana Yusuf HMP (menentang):

(1) Polisi awam mendasari *Merong Mahawangsa* hanya berkait dengan polisi awam apabila penjajaan pengaruh adalah secara terus atas pihak berkuasa awam untuk memperoleh kontrak Kerajaan. Satu perjanjian melalui jualan dalam pejabat awam berkemungkinan memprejudis perkhidmatan awam dengan mencampur tangan pemilihan orang atau perkhidmatan yang paling layak. Oleh itu, jualan sedemikian tidak sah dan terbatal. Walau bagaimanapun, hakim tidak pernah dipertanggungjawabkan untuk membuat spekulasi atau memberi pendapat berkaitan kebaikan dan keburukan jajaan pengaruh terhadap pihak persendirian untuk memperoleh kontrak persendirian, kerana ini adalah dalam bidang kuasa Perundangan untuk menentukan dan membuat peruntukan untuk penggubalan sewajarnya. Responden tidak membuktikan terdapat kesan jelas dan memudaratkan yang boleh disimpulkan daripada tindakan penyimpangan proses tender sedemikian. Tidak seperti *Merong Mahawangsa*, tidak boleh disimpulkan bahawa perjanjian pencadang boleh mengakibatkan rasuah, atau apa-apa kesan memudaratkan jelas yang lain atas orang awam Malaysia.

(2) Mahkamah Rayuan jelas terkhilaf apabila membangkitkan polisi awam untuk mentaksahkan perjanjian pencadang atas kedua-dua aspek. Pertama, penjajaan pengaruh yang dinyatakan tidak disokong keterangan jelas seperti yang diperlukan dalam ujian yang dinyatakan dalam *Merong Mahawangsa* dan polisi awam yang didakwa terhadap penjajaan pengaruh dalam kes ini, bukan tidak dipertikaikan dan tidak dibuktikan sebagai memudaratkan orang awam Malaysia sama sekali. Oleh itu, perjanjian pencadang tidak boleh ditaksahkan bawah s. 24(e) Akta. Dengan itu, tiada asas untuk bersandar atas prinsip undang-undang berdasarkan polisi awam seperti yang dinyatakan dalam kes *Merong Mahawangsa* untuk memutuskan bahawa perjanjian pencadang tidak sah.

(3) Hubungan antara pihak-pihak bermula apabila perayu membuat kontrak pertamanya dengan CRBC, mendapat tahu mengenai projek itu dan kemudian bertemu dengan responden. Selepas itu, perayu meneruskan bekerja dengan responden yang menjurus pada semakan sebut harga pertama yang disediakan responden. Oleh itu, perayu yang memulakan titik hubungan dengan responden untuk berurusan dengan CRBC dan perayu yang berbincang dengan CRBC bagi pihak responden dan mengemukakan sebut harga kedua dengan CRBC. Selanjutnya, saksi responden mengakui bahawa sebelum perayu terlibat, dia tidak pernah mengemukakan atau membida untuk kerja struktur kepada CRBC, kerana tidak mengetahui tentang projek tersebut.

(4) Pengeluaran surat niat oleh CRBC kepada responden memenuhi apa yang dibayangkan dalam kl. 5. Apa yang perayu perlu tunjukkan adalah kerja kontrak diawardkan kepada responden. Oleh sebab surat niat dikeluarkan, responden kemudian berbincang terus dengan CRBC dengan mengecualikan perayu. Responden tidak mengemas kini perayu tentang apa-apa kemajuan. Apabila surat penolakan sebut harga kedua dikeluarkan, responden tidak memaklumkan perayu untuk membolehkan apa-apa langkah pemulihan diambil. Kemudian, responden sendiri mengemukakan sebut harga baru untuk RM61,688,966.25 untuk kerja-kerja struktur dan arkitek tanpa apa-apa notis kepada perayu oleh sebab mereka dalam perbincangan terus antara satu sama lain. Responden telah memintas perayu dan berurusan secara langsung dengan CRBC untuk mengelak daripada membayar bawah perjanjian pencadang.

(5) Tiada apa-apa dalam perjanjian pencadang yang boleh ditafsir bahawa perayu menjamin sub-kontrak tersebut akan diawardkan kepada responden oleh CRBC. Kewajipan perayu bawah kl. 4 adalah hanya untuk membantu dalam mendapatkan award untuk projek kepada responden oleh CRBC, yang dipenuhi perayu. Klausa 5 telah pun dipenuhi apabila responden diberi surat niat. Walaupun responden

akhirnya mendapat projek tersebut untuk jumlah kira-kira RM58.6 juta, tidak dipertikaikan bahawa kontrak diawardkan termasuk kerja-kerja struktur yang menjadi perkara perjanjian pencadang. Oleh itu, jumlah yang perlu dibayar kepada perayu adalah menurut kl. 7(c) dan bukan kl. 6. Perayu, oleh itu, berhak pada perbezaan antara sebut harga kedua dan jumlah sebenar yang diawardkan kepada responden hanya untuk kerja-kerja struktur.

Case(s) referred to:

Bank Perusahaan Kecil & Sederhana Malaysia Bhd v. Iskandar Zulkarnain Zainal Abidin [2013] 1 LNS 308 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Berjaya Times Square Sdn Bhd v. Twingems Sdn Bhd & Anor And Another Case (No 2) [2012] 1 LNS 166 HC ***(refd)***

BK Fleet Management Sdn Bhd v. Stanson Marketing Sdn Bhd [2018] 9 CLJ 449 CA ***(refd)***

Chin v. Audrey Ramona Chin (Jamaica) [2001] UKPC 7 ***(refd)***

Donald James Rae & Anor v. Bruno Sorrentino & Another Appeal [2014] 1 LNS 1102 CA ***(refd)***

Egerton v. Earl Brownlow (1853) 4 HL Cas 1 ***(refd)***

Fender v. Mildmay [1938] AC 1 ***(refd)***

Hairin Corporation Sdn Bhd v. Rimbun Tekad Premix (Terengganu) Sdn Bhd [2016] 1 LNS 424 CA ***(refd)***

Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd [1988] 1 QB 448 ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Montefiore v. Menday Motor Components Company, Limited [1918] 2 KB 241 ***(refd)***

Nortel Networks (Asia) Ltd & Ors v. Sapura Holdings Sdn Bhd & Anor [2012] 8 CLJ 296 CA ***(refd)***

R v. Cleary [1992] NSCO 43 ***(refd)***

Rodriguez v. Speyer Brothers [1919] AC 59 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Tekron Resources Limited v. Guinea Investment Company Limited [2003] EWHC 2577 ***(refd)***

The Bunga Melati Dua [2011] 3 All ER 554 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Wah Tat Bank Ltd & Ors v. Chan Cheng Kum & Ors [1967] 1 LNS 203 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(a), (e)

Courts of Judicature Act 1964, s. 78

Evidence Act 1950, ss. 91, 92

The Indian Contract Act 1872 [Ind], s. 23

Other source(s) referred to:
Cheshire and Fifoot's Law of Contract, 8th edn, p 322

For the appellant - Cecil Abraham & Sunil Abraham; M/s Cecil Abraham & Partners
For the respondent - Christopher Leong & Michelle Khor; M/s Gan & Zul

[Editor's note: For the Court of Appeal judgment, please see Wong Yee Boon v. Gainvest Builders [2017] 10 CLJ 209 (affirmed).]

Reported by S Barathi

JUDGMENT

Azahar Mohamed FCJ (majority):

[1] In this judgment, parties will be referred to in their respective capacity in the High Court, namely the appellant as the plaintiff and the respondent as the defendant.

[2] This appeal concerns a claim by the plaintiff for the amount of RM4,276,027.10 for the defendant's breach of an agreement. His claim was dismissed by the High Court, and the Court of Appeal subsequently dismissed his appeal.

[3] This court had granted the plaintiff leave to appeal against the decision of the Court of Appeal on the following question of law:

> Whether the principle of law espoused in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619, ie, that "an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s. 24(e) of the Contracts Act 1950 and is therefore void", ie, the *Merong Mahawangsa principle*, extends and/or applies to private arrangements between private parties?

[4] The question of law in essence concerns the extent to which the *dicta* of the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 which concerned an agreement to influence the decision of a public decision-maker in the award of contract is to apply to private arrangements between private parties.

[5] In respect of the question of law posed, I have read the judgment in draft of my learned sister Justice Rohana Yusuf. On the basis of the factual matrix of the present case, I agree with my learned sister's views that it is unnecessary for us to answer the leave question posed. I would prefer to leave the resolution of the question of law to a case where the question must necessarily be determined.

[6] However, on the issue of whether the plaintiff was entitled to be paid under the agreement, with due respect, I am unable to agree with the opinion expressed and the conclusion arrived at by my learned sister. This issue concerns the extent to which the plaintiff has performed his contractual obligations under the agreement in question.

[7] I now set out my reasons.

[8] As a starting point, it is important to bear in mind the basic principle of construction of contracts. The basic rule is that effect must be given to the intention of the parties. This requires an objective test and not a subjective approach. It is an objective approach which is required and a solution should be found which is both reasonable and realistic (see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 592). The intention must be sought from the document itself. To ascertain the intention of the parties, the court reads the terms of the contract as whole, giving the words used their natural and ordinary meaning. We have explained this basic principle in the case of *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 AMR 101 as follows:

> [34] … In this regard, the point which has a strong bearing on the matter is that it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 3 CLJ (Rep) 37 and *Mulpha Pacific Sdn Bhd v. Paramount Corp Bhd* [2003] 4 MLJ 357). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.
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> [35] Professor McMeel in *The Construction of Contracts (Interpretation, Implication and Rectification)* (2nd Ed, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:
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> > Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.

A [36] As stated by Lewison in *The Interpretation of Contracts* 5th Edition at para 7.02 that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. In *Chamber Colliery Company Ltd v. Twyerould* (1893) [1915] 1 Ch. 268 (note) (which was cited by Lewison), Lord Watson said:

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> I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

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[9] It is with the above principles in mind that I approach the issue of whether the plaintiff was entitled to be paid under the agreement.

[10] The subject matter of the plaintiff's action concerns an agreement between the plaintiff and the defendant dated 19 November 2008 ("agreement"). The agreement was in substance an agreement between the parties for a payment in the event the plaintiff was successful in procuring the award in favour of the defendant of a sub-contract for structural concrete works with regards to a construction project.

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E **[11]** The project in question, namely 'Cadangan Pembangunan Bangunan Tambahan Bagi Ibu Pejabat Polis Kontinjen, Kuala Lumpur' was a Government project to build an extension to the existing Kuala Lumpur Police Contingent building. The project was to be owned and implemented by Pembinaan BLT, which was a wholly-owned subsidiary of the Ministry of Finance. Pembinaan BLT awarded the main contract for the whole project to Mitisa Holdings Sdn Bhd ('Mitisa'). Mitisa then appointed CRBC (Malaysia) Holdings Sdn Bhd ('CRBC") as the main sub-contractor for the whole project. CRBC had undertaken a tender process to identify and engage a sub-contractor to carry out the sub-contract component with respect to the structural concrete works for the project.

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G **[12]** The defendant is a construction company and a Class A contractor registered and was interested to bid for the sub-contract for structural concrete works.

[13] By virtue of the agreement, the plaintiff shall assist the defendant in
H securing the said project as a sub-contractor from CRBC in the following manner. The defendant will fill in CRBC's bill of quantities ("BQ") form for the sub-contract for structural concrete works with the defendant's contract price/construction cost in respect of each of the items in the BQ ("first quotation"). The plaintiff will then mark-up all the prices of the defendant's
I quotation in the BQ ("second quotation"). The defendant will then submit

the second quotation to CRBC. The mark-up differences shall be the consideration to the plaintiff for causing CRBC to accept the second quotation.

[14] According to the plaintiff, the first quotation submitted by the defendant on 19 November 2008 was RM31,093,478.15. The plaintiff's contribution was to revise upwards the price into what is called the second quotation. The plaintiff marked up the said first quotation by a substantial amount that is from RM31,093,478.15 to RM35,369,505.25. The difference between the said first quotation and the marked up second quotation was RM4,276,027.10, and it is this amount that the plaintiff sought for an order of the court that the defendant pays to the plaintiff.

[15] The plaintiff then proceeded to demand payment from the defendant on the basis that he has fulfilled his obligations pursuant to the agreement. The defendant denied that such sum was due and owing.

[16] The plaintiff then filed a claim against the defendant where, among others, the plaintiff sought for an order that the defendant pays to the plaintiff:

(i) the sum of RM4,276,027;

(ii) interest on the sum of RM4,276,027 at the rate of 10% per annum pursuant to cl. 8(c) of the agreement; and

(iii) alternatively, any increased and/or decreased consideration sum pursuant to cl. 7(c) of the agreement.

[17] The rival contentions of the parties bring into focus what was actually agreed between the plaintiff and the defendant. This is an important point that we must look carefully. The material terms and conditions of the agreement were in the following terms:

> Clause 2: Award of Project to the Sub-Contractor
>
> "The Sub-Contractor is awarded the Project by CRBC. (Hereinafter called "Contractor")
>
> Clause 3: Obligations of the Sub-Contractor
>
> a. The Sub-Contractor shall submit two (2) quotations with regards to the Project as follows:
>
> i. The first quotation shall be submitted to the Introducer. A copy of the said first quotation shall be submitted to the Introducer and agreed by both Parties for validity and counter-signed by both parties and attached to this Agreement at a later date from the date of this Agreement.

A

ii. Thereafter, the Introducer shall revise the Project sum in the first quotation and thereafter the quotation as revised by the Introducer shall be submitted by the Sub-Contractor to the Contractor for the Contractor's approval (hereinafter called "the second quotation"). A copy of the second quotation shall be submitted to the Introducer and agreed by both Parties for validity and counter-signed by both parties and attached to this Agreement at a later date from the date of this Agreement.

B

b. The Sub-Contractor shall pay to the Introducer the consideration as stipulated in Clause 4 of this Agreement in accordance with the agreed payment terms as defined in Clause 5 of this Agreement.

C

Clause 4: Obligations of the Introducer

a. Advise, negotiate and facilitate with information to the Sub-Contractor with regards to the revision of the first quotation as defined in Clause 3(a)(i).

D

b. Compile all relevant documentation required for the Sub-Contractor to submit the second quotation as defined in Clause 3(a)(ii) of this Agreement.

c. Assist, liaise and work closely with the Sub-Contractor in matters that leads to obtaining the tender of the Project from the Contractor.

E

d. Assist in securing the award of the Project to the Sub-Contractor by the Contractor.

Clause 5: Condition

The validity of this Agreement shall be dependent on the award of the

F

Project to the Sub-Contractor by the Contractor.

Clause 6: Consideration

Subject to Clause 7 below, in consideration of the Introducer's initiatives, the Sub-Contractor shall pay to the Introducer the sum that is the difference between the first and the second quotations. The computation

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of this difference is as follows:

Second Quotation	RM35,369,505.25
(less) First Quotation	(RM31,093,478,15)
TOTAL CONSIDERATION	RM4,276,027.10

H

Clause 7: Payment terms

a. The consideration as described in Clause 6 shall be payable progressively to the Introducer by the Sub-Contractor. All invoices paid on to the Sub-Contractor by the Contractor shall be subject to necessary deductions payable to the Introducer. For the avoidance

I

of doubt, the said deductions shall mean the corresponding difference (s) between the second quotation as per Clause 6 above.

b. Payment must be remitted to the Introducer no later than three (3) days after the Sub-Contractor is in receipt of payment from the Contract.

c. In the event where there is an increase or decrease that shall affect the total Consideration sum due to the Introducer by virtue of Clause 6 above, the difference shall be either added on or deducted in accordance with Clause 6 above and progressively as described in Clause 7a above.

[18] It is to be noted that cl. 2 states that the sub-contract is awarded to the defendant, when in fact the second quotation was only submitted to CRBC on the same day as the agreement, namely, 19 November 2008. It bears noting that cl. 3 provides that the defendant shall prepare the quotation for the BQ, which is called the first quotation. The first quotation is submitted to the plaintiff and he will revise the project sum therein. The second quotation will then be submitted to CRBC for its consideration and approval. Notably, cl. 5 provides that the validity of this agreement shall be dependent on the award of the project to the sub-contractor (defendant) by the contractor (CRBC). What is even more important is that cl. 6 already sets out the amounts and workings of the first quotation as RM31,093,478.15 and the second quotation as RM35,369,505.25, and that the plaintiff shall be paid the entire marked up amount of RM4,276,027.10 being the difference between the first and second quotations.

[19] It is not disputed that several first and second quotations were prepared in the course of the exercise. On each occasion, the value or amount of the first quotation of the defendant remained the same, that is, constant, and that it was the amount of the inflated price in the second quotation revised by the plaintiff, which changed.

[20] Finally, the defendant produced its revised quotation dated 15 November 2008 for the total contract sum of RM31,093,478.15 (first quotation) for the sub-contract for structural concrete works. The plaintiff then revised the defendant's first quotation by marking it up to RM35,369,505.25 (second quotation). This then became the final agreed version of the second quotation between the plaintiff and the defendant. The total marked up margin or difference between the defendant's first quotation and the defendant's marked up second quotation was the sum of RM4,276,027.10, which became the subject matter of the plaintiff's claim against the defendant.

[21] As it turned out, subsequent to the submission of the second quotation to CRBC, the defendant had to attend a tender interview. The defendant was informed at the interview that the price in the second quotation of RM35,369,505.25 for the sub-contract for structural concrete works was too high for them to accept. CRBC informed the defendant that it would not

accept the second quotation. CRBC had by its letter dated 11 December 2008 to the defendant officially rejected the second quotation of RM35,369,505.25 submitted for the sub-contract for structural concrete works by the defendant. The letter reads:

> Our Ref: CRBC/GVSB/IPKKL/08/1020
>
> GAINVEST BUILDERS (M) SDN BHD 11 Dec 2008
> No. 69, Jalan SS6/10, Kelana Jaya,
> 47301 Petaling Jaya,
> Selangor.
>
> Attention: Mr New Chee Pheng – Director
>
> Dear Sir,
>
> CADANGAN PEMBANGUNAN BANGUNAN TAMBAHAN BAGI IBU PEJABAT POLIS KONTIJEN KUALA LUMPUR (IPKKL) SERTA KOMPONENNYA DI ATAS LOT PT112, SEKSYEN 56, MUKIM BANDAR, KUALA LUMPUR UNTUK TETUAN POLIS DI RAJA MALAYSIA ("the project")
>
> - Quotation
>
> ---
>
> With refer to your quotation dated 19th November 2008, ref no GBMSB/GTSB/07/TS/21R6, we regret to inform you that we are unable to accept your quotation amounting RM35,369,505.25.
>
> Thank you for your participation
>
> Yours sincerely,
>
> CRBC (M) HOLDINGS SDN BHD
>
> Felix Ling
> Project Director.

[22] In this way, the plaintiff failed to fulfill his obligation under the agreement; and there is no payment to be made as per the workings and sum in cl. 6.

[23] At the same tender interview meeting referred to, CRBC inquired as to whether the defendant would be interested to undertake the whole of the construction works of the project for structural and architectural works for lower price. CRBC and the defendant were in direct communication, without the plaintiff knowing. In this regard, the defendant submitted a new quotation to CRBC in the sum of RM61,688,966.25 for both the same structural and architectural works as follows:

Our Ref: GBMSB/GTSB/07/TS/21R7

22nd December 2008

CRBC (M) Holdings Sdn. Bhd.
Suite 33-6, 33rd Floor Wisma OUA II
No.21, Jalan Pinang
50450 Kuala Lumpur.

Attention: Mr Felix Ling

Dear Sir,

QUOTATION FOR CADANGAN PEMBANGUNAN BANGUNAN TAMBAHAN BAGI IBU PEJABAT POLIS KONTIJEN KUALA LUMPUR (IPKKL) SERTA KOMPONENNYA DI ATAS LOT PT112, SEKSYEN 56, MUKIM BANDAR, KUALA LUMPUR

Re : Quotation Submission

We refer to the above project and we are pleased to forward herewith one (1) set of Quotation Document for your kind consideration. Our Provisional Firm Price Tender Sum shall be in the amount of RM61,688,966.25 (Ringgit Malaysia: Sixty One Million Six Hundred Eighty Eight Thousand Nine Hundred Sixty Six And Cents Twenty Five Only), which is complied with the Scope of works, Bill of Quantities and Tender Drawings.

Kindly be informed that our quotation is subject to following clarification:-

1) Payment term: 30 days upon our submission of claim.
2) Completion period is 24 months.
3) Defects Liability Period shall be 18 months from our completion date.
4) All concrete quoted are normal mix.
5) As par discussion in the last tender interview, we will submit a performance bond equivalent to 2.5% of our subcontract value.
6) Retention sum is 2.5% of contract sum.
7) Refer to our tender clarification tabulation.

We trust that our quotation submission meets with your requirement and looking forward to your favourable instruction.

Thank you.

Yours faithfully,
GAINVEST BUILDERS (M) SDN. BHD.

New Chee Pheng
Director

[24] In this connection, the important point to note is this. This was a new scope of works that the defendant was quoting for. There was no "second quotation" marked up with inflated prices by the plaintiff. This quotation was also rejected by CRBC as being too high.

[25] Subsequently, the defendant's quotation for the sub-contract for the whole of the works was reduced by CRBC to RM58.6 million. The defendant agreed to this. What stands out is that, there was therefore again no "second quotation" marked up by the plaintiff.

[26] Later, CRBC had by its letter dated 9 January 2009 titled "letter of award for the whole works comprised in the project" awarded the sub-contract for the whole works to the defendant for the contract sum of RM58.6 million. The relevant part of the letter reads as follows:

> Date : 9th January 2009
> Our ref : IPKKL/GVBSB/L(HO)-1/09
>
> Gainvest Builders (M) Sdn. Bhd.
> No 69, Jalan SS 6/10, Kelana Jaya,
> 47301 Petaling Jaya,
> Selangor Darul Ehsan.
>
> Attn: Mr New Chee Pheng – Director
>
> Dear Sir,
>
> Project: CADANGAN PEMBANGUNAN TAMBAHAN BAGI IBU PEJABAT POLIS KONTINJEN KUALA LUMPUR (IPK KL) SERTA KOMPONENNYA DI ATAS LOT PT 112, SEKSYEN 56, MUKIM BANDAR, KUALA LUMPUR UNTUK TETUAN POLIS DI RAJA MALAYSIA ("the project")
>
> Re : Letter of Award for the whole works comprised in the Project
>
> ---
>
> We refer to the above and are pleased to inform you that your company has been awarded the abovementioned sub-contract subject to the following terms and conditions.
>
> NOW IT IS HEREBY AGREED as follows:-
>
> a) In consideration of the agreement, obligations, covenants and undertakings on the part of the Contractor in this Contract, the Sub-Contractor will commence, execute and complete the Works comprised in the Project including maintenance work, up till the issuance of the Certificate of Making Good Defects upon the terms and conditions hereinafter contained.
>
> b) In consideration of the agreement on the part of the Sub-Contractor in this Contract, the Contractor will make payments to the Sub-Contractor and will observe and carry out its obligations in accordance with the provisions of the Contract and the Conditions of Contract annexed hereto.

c) The Sub-Contractor will execute the Works in a proper and workmanlike manner in accordance with the relevant Drawings and Specifications and must comply with the relevant current Standards, Building Codes, regulations and requirements of all relevant governmental authorities having jurisdiction over the Works.

d) The Sub-Contractor shall not sub-let the whole of the works without the written consent of the Contractor. Sub-letting of specialized trades in parts is permissible on condition that it must be in accordance and in compliance with the conditions of the Sub-Contract and the Main Contract.

e) Where it is absolutely necessary that foreign workers are to be employed, the Sub-Contractor shall be responsible for obtaining the work permits for these workers and to pay all fees, levies and costs that are legally demandable. The Sub-Contractor shall be responsible for all aspect pertaining to this matter.

Under no circumstances are illegal immigrants allowed to be employed or engaged in the Project. Any losses, summons or penalties from the authorities due to the contravention, regardless of whether it is an unintentional oversight, or whatsoever reasons or circumstances, shall be borne solely by the Sub-Contractor.

f) The Sub-Contractor shall at all times indemnify the Contractor and the Principal Contractor against all liabilities that may arise from any default and/or breach of the Sub-Contract or the Main Contract including bodily injury, damage to properties or other loss which may arise out of or in consequence of the execution, completion or maintenance or design if any, of the Sub-Contract Works and against all costs, charges and expense that may be occasioned to the Contractor by the claims of such persons/parties.

g) This Sub-Contract shall be governed by and construed with reference to the laws currently in force in Malaysia and the parties hereto hereby submit to the jurisdiction of the courts in Malaysia.

[27] This letter of award to the defendant was not issued pursuant to the plaintiff's effort under the agreement. The plaintiff pursuant to the agreement did not cause the award as the earlier 'second quotation' has been rejected by the CRBC.

[28] The defendant commenced works of the whole sub-contract works on the project pursuant to the letter of award dated 9 January 2009. However, six months thereafter, *vide* letter dated 12 July 2009 Mitisa terminated CRBC as the main sub-contractor of the project. This termination effectively also terminated the said award dated 9 January 2009 of the sub-contract for the whole works to the defendant (as the defendant was the sub-contractor to CRBC). Pursuant to the termination of CRBC as the main sub-contractor, the defendant as CRBC's sub-contractor was effectively terminated and the defendant did not receive any further payment.

[29] A few months after the termination by Mitisa of CRBC as the main sub-contractor, Mitisa had wished to appoint the defendant as the main sub-contractor for the entire project. There were negotiations between them, and the defendant agreed to be appointed as the main sub-contractor. Mitisa issued a new letter of award dated 15 September 2009 to the defendant appointing the defendant as the main sub-contractor for the project for a provisional contract sum of RM80,713,699.75. The material parts of the letter are in the following terms:

Our ref : MH/GB/IPKKL/0310/09
Date : 15th September 2009

GAINVEST BUILDERS (M) SDN BHD
No 69, Jalan SS6/10
Kelana Jaya
47301 Petaling Jaya
Selangor

Attention : Mr New Chee Pheng
(Executive Director)

Dear Sir,

CADANGAN PEMBANGUNAN BANGUNAN TAMBAHAN BAGI IBU PEJABAT POLIS KONTINJEN KUALA LUMPUR (IPK KL) SERTA KOMPONENNYA DI ATAS LOT PT 112, SEKSYEN 56, MUKIM BANDAR, KUALA LUMPUR UNTUK TETUAN POLIS DI RAJA MALAYSIA

- LETTER OF AWARD

The above refers.

We are pleased to appoint you as the Main Sub-Contractor for the above project on the following terms and conditions:

1. **Main Sub-Contract Sum**:

   The Provisional Total Sub-Contract Sum shall be RM80,713.699.75 (Ringgit Malaysia: Eighty Million Seven Hundred Thirteen Thousand, Six Hundred Ninety Nine and Sen Seventy Five Only) comprises the following:

   a. A sum of RM74,585,699.75 (Ringgit Malaysia: Seventy Four Million, Five Hundred Eighty Six Thousand, Six Hundred Ninety Nine and Sen Seventy Five Only) being the sum of the builders work.

   b. A sum of RM6,127,000.00 (Ringgit Malaysia: Six Million, One Hundred Twenty Seven Thousand Only) being the sum allocated under the Main Contract as Provisional Sum herein

after referred to as 'the Provisional Sum' and shall be awarded under this Main-Sub-Contract Sum Letter of Award should the works be awarded to the Main Contract Sum consist of:

i) Work Station

ii) Built-In Fitment, Internal Partitions, Signages, Directories and Logo

iii) Demolitions of Existing Sub-Structures

iv) Modifications and Relocations of Existing Services

v) Landscaping

vi) Factory Acceptance Test (FAT)

2. Scope of Work:

a. Gainvest Builders Sdn Bhd shall undertake to carry out preliminary items under the Main Contract Work except the following items:

(i) Insurance of Work

(ii) CIDB Levy

b. Gainvest Builders Sdn Bhd shall undertake to complete all the Builders Work under in the Main Sub-Contract hereinafter referred to as 'the sub-contract works' within the agreed stipulated time and duration under the Main Contract excluding Mechanical and Electrical and its related coordination works.

c. Carry out all the sub-contract works diligently and shall at all times protect Mitisa Holdings Sdn Bhd reputation and performance and shall absolve Mitisa Holdings Sdn Bhd (MHSB) of any legal obligations under the Main Contract.

d. MHSB shall carry out MHSB's main duties as the main contractor at all times to PBLT. In the matters pertaining to the main contract, and Gainvest Builders Sdn Bhd shall at all times assist and cooperate.

e. Gainvest Builders Sdn Bhd shall furnish all site progress works and information to MHSB.

[30] What is even more important to note is that this was an entirely new scope of works and role undertaken by the defendant. The plaintiff was not involved in this, and there was no marked up "second quotation". The defendant was awarded this contract by its own effort and not the effort of the plaintiff pursuant to the agreement.

[31] From the foregoing discussion and on the facts of the case, it is clear that reading the terms of the agreement as a whole, the plaintiff is not entitled to any payment as claimed under the agreement. The defendant has no obligation to pay any sum to the plaintiff under the agreement. In consequence and in view of all the reasons stated above, this appeal fails and must be dismissed with costs.

[32] My learned brother, Justice Ahmad Maarop (PCA) has read my judgment in draft and has expressed his agreement with it and has agreed to adopt the same as the majority judgment of the court.

[33] This judgment is prepared pursuant to s. 78 of the Courts of Judicature Act 1964 as Justice Zaharah Ibrahim and Justice Alizatul Khair Osman Khairuddin have since retired.

Rohana Yusuf FCJ (dissenting):

[34] The appellant instituted a claim against the respondent in the High Court at Kuala Lumpur, for some payment pursuant to an agreement entered between them, known as an introducer agreement. The claim was dismissed by the High Court, as the introducer agreement was found to be an illegal contract pursuant to s. 24 of the Contracts Act 1950, applying the principle of law as enunciated by this court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619. The appeal of the appellant at the Court of Appeal was also dismissed for the same reason.

[35] Leave was obtained from this court to determine the question of law as to whether the principle of law on public policy in *Merong Mahawangsa* equally applies to an agreement made between two private parties. We have heard the appeal and had reserved our decision to a date to be informed to the parties. This is my decision and the grounds of my judgment.

Background Facts

[36] The introducer agreement came about following a construction project embarked upon by the Government of Malaysia to construct an additional building for Ibu Pejabat Polis Kontinjen Kuala Lumpur (IPKKL) on Lot PT 112 Seksyen 56 Mukim Bandar Kuala Lumpur (the project). The Government of Malaysia appointed Pembinaan BLT Sdn Bhd as the implementer of the project on its behalf. Mitisa Holdings Sdn Bhd was appointed as the main contractor and Generasi Tangkas Sdn Bhd (Generasi Tangkas) was initially appointed as the main sub-contractor. Later, the main sub-contractor was substituted with CRBC (Malaysia) Holdings Sdn Bhd (CRBC).

[37] According to the appellant, on 25 January 2007 he was approached by a director of CRBC Mr. Hu Bin who introduced the appellant to Mr. Felix Ling, the director of Generasi Tangkas and Encik Mohd Johari Mat Aris who was the CEO of Mitisa, whereupon the appellant discovered about the project. Mr. Felix Ling was also a Project Director in CRBC. The respondent was a Class A contractor and was interested in obtaining some sub-contract works in the project. According to the respondent, the appellant represented that he had some influence and connection with CRBC to enable the respondent to be engaged by CRBC to perform some of the sub-contract works.

[38] Following that meeting, the respondent issued a letter dated 19 November 2008 appointing the appellant as an introducer and the terms of engagement between them were expressed in the introducer agreement of even date. The introducer agreement, in essence, appoints the appellant as the introducer in relation to sub-contract works with CRBC. The obligations of the appellant are spelled out in cls. 4(a) to (d) below:

> (a) Advise, negotiate and facilitate with information to the Sub-Contractor with regards to the revision of the First Quotation as defined in Clause 3(a)(i);
>
> (b) Compile all relevant documentation required for the Sub-Contractor to submit the second quotation as defined in Clause 3(a)(ii) of this Agreement;
>
> (c) Assist, liaise and work closely with the Sub-Contractor in matters that leads to obtaining the tender of the Project from the Contractor; and
>
> (d) Assist in securing the award of the Project to the Sub-Contractor by the Contractor.

[39] The other salient term of the introducer agreement is under cl. 3. Under this clause, the respondent is obliged to submit a quotation in relation to the sub-contract works under the project to the appellant. The appellant's duty was to revise that quotation for onward submission to CRBC to bid for the sub-contract works. In accordance with cl. 6 of the introducer agreement, the appellant would be paid the differential sum between the quotation prepared by the respondent with the one revised by the appellant, as consideration under the agreement.

[40] As it turned out, the quotation of RM31,093,478.15 by the respondent was revised upwards to RM35,369,505.25 (the revised quotation) by the appellant making a difference of RM4,276,027.10. This difference is the agreed consideration payable to the appellant by the respondent, pursuant to cl. 6 of the introducer agreement. This is also the subject matter of the claim of the appellant in this appeal.

[41] Under cl. 5 it is also stated that the validity of the introducer agreement, "shall be dependent on the award of the project to the respondent by the contractor". Clause 7 specifies the mode of payment, where cl. 7(c) allows for variation to the sum of payment.

[42] The revised quotation was submitted to CRBC to bid for the sub-contract work on 19 November 2008. Through its Board of Directors, CRBC directed Mr. Felix Ling, as a Project Director, to conduct tender interviews of all the bidders including the respondent. The respondent's representatives Mr. An Haijing and Mr. Zhow attended the tender interview. They both claimed to have been informed that the revised quotation was too high for structural concrete work. Officially, by way of a letter dated 11 December 2008, CRBC rejected the bid of the respondent made through the revised quotation.

[43] The respondent protested and wrote to the appellant on 12 January 2009 to complain that his representation of having the necessary connection with CRBC was false and that the management of CRBC had also informed them denying that relationship. Accordingly, the respondent was terminating the introducer agreement.

[44] The event that followed subsequently was that CRBC enquired directly if the respondent would like to undertake the whole sub-contract works, structural and architectural, at a lower price. The contract price was said to be around RM61 million. When the respondent requested for a letter of intent to be issued, the respondent through Mr. Felix Ling was issued with a letter dated 4 December 2008 informing that CRBC had agreed to appoint the respondent as a sub-contractor to undertake the whole of the works at an agreed cost of RM61 million. However, that letter of intent was retracted by Mr. Felix Ling, who then issued another letter of 11 December 2008.

[45] Eventually, CRBC had, by a letter dated 9 January 2009 awarded the whole of the sub-contract works to the respondent for the contract sum of RM58.6 million.

[46] The respondent commenced work pursuant to the letter of award of 9 January 2009 for six months, after which CRBC was terminated as the main sub-contractor of the project by Mitisa. Consequently, the respondent was terminated by CRBC. The respondent filed a suit against CRBC on the termination and CRBC also sued Mitisa. Months later, Mitisa initiated negotiation directly with the respondent to be the main sub-contractor.

In The High Court

[47] The claim of the appellant against the respondent was for the payment due and owing under the introducer agreement, pursuant to cl. 6. The trial at the High Court proceeded for 14 days with three witnesses on each side. At the end of the trial, the claim of the appellant was dismissed by the High Court. In summary, it was held that:

(i) the project was a Government project which was meant for a public purpose;

(ii) the terms of the introducer agreement required a mark-up of the quoted price by the respondent which was generously revised upwards by the appellant to eventually create the difference to form the consideration payable to the appellant by the respondent;

(iii) two other bidders were not afforded the same kind of assistance where no discussion of any sort was done by the appellant for the benefit of the respondent;

(iv) the contract was against public policy and it fell squarely on all fours with *Merong Mahawangsa Sdn Bhd* (*supra*);

(v) it would be unfair for the appellant to be paid by the respondent when in fact he should have been paid by CRBC; and

(vi) the appellant had not proven that he is entitled to the claim as in his prayers in the statement of claim.

In The Court Of Appeal

[48] The appellant lodged an appeal against the whole of the High Court's decision. Besides the issue of illegality, the main grounds of appeal before the Court of Appeal was that the learned trial judge had failed to consider the evidence that the appellant had indeed fulfilled all his obligations under the introducer agreement. In short, no finding was made as to the fulfillment of the contract by the appellant. The Court of Appeal in dismissing the appeal of the appellant had gone into the issue on the finding of illegality by the High Court. It was made clear by the Court of Appeal that should it decide that threshold issue and affirm the illegality as found by the High Court, it would not proceed on any other finding since an illegal contract conferred no rights or obligations on parties.

[49] In the end, it became one of the bones of contentions by the appellant that both courts failed to judicially appreciate the evidence and failed to make the necessary finding of facts that the appellant had indeed discharged his obligations pursuant to the introducer agreement and was entitled to the payment as agreed.

[50] In dismissing the appeal, the Court of Appeal accepted and affirmed the fact as found by the High Court that there was indeed a representation made by the appellant on his position to influence CRBC in order to obtain the sub-contract works for the respondent, that such representation was relied upon by the respondent, and there was "influence peddling" in respect of a contract closely linked to the project which was a public interest project. Hence the Court of Appeal affirmed the decision of the trial judge that the

introducer agreement was a contract within the ambit of s. 24 of the Contracts Act 1950, applying the principle of law as pronounced in *Merong Mahawangsa.* The introducer agreement was then found to be illegal pursuant to s. 24(e) of the Contracts Act. Hence no finding was made on whether the appellant had performed all his obligations pursuant to the introducer agreement.

Leave Question

[51] This court had on 2 October 2017 granted leave to appeal on the following question of law:

> Whether the principle of law espoused in *Merong Mahawangsa Sdn Bhd and Another v. Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619, ie, that 'an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under section 24(e) of the Contracts Act 1950 and is therefore void', ie, the *Merong Mahawangsa* principle, extends and/or applies to private arrangements between private parties?

Submissions Of Parties

[52] Just as in the Court of Appeal, the grounds of appeal raised by the appellant before us were also presented in two main parts:

(i) The first part dealt with the issue of illegality and the applicability of the principle of law espoused in *Merong Mahawangsa* to private arrangements between private parties.

(ii) The second part was in reference to the alleged failure on the part of the Court of Appeal to properly and judicially appreciate the evidence that the appellant had indeed performed all his obligations pursuant to the terms and conditions of the introducer agreement, and would be entitled to the reliefs sought in his claim against the respondent.

Dispute On The Alleged Misrepresentation

[53] Both courts below were misguided accepting that there was indeed such misrepresentation. On the issue of illegality, learned counsel for the appellant had first of all, impressed upon us that there was no representation made by the appellant that he had any influence with CRBC. That the trial court was in error in relying on the evidence of DW2 to determine that there was indeed such representation made. The Court of Appeal was also in error in affirming that decision. All the communications produced at the trial according to learned counsel, do not make reference to the alleged influence or representation. Furthermore, they were communications made prior to the execution of the introducer agreement.

[54] Even if there is influence peddling, it was submitted that, the High Court had misapplied the principle of *Merong Mahawangsa* to private parties. Such application would not meet the threshold requirement for extending the meaning of public policy as established in that case. Various cases based on common law principles on the issue of public policy were cited including *Fender v. Mildmay* [1938] AC 1, 351-353, *The Bunga Melati Dua* [2011] 3 All ER 554, *Egerton v. Earl Brownlow* (1853) 4 HL Cas 1 at 123-124, *Rodriguez v. Speyer Brothers* [1919] AC 59 at 135-136, *BK Fleet Management Sdn Bhd v. Stanson Marketing Sdn Bhd* [2018] 9 CLJ 449; [2017] MLJU 1181.

[55] Relying on the general principle of law that the court should not invent a new head of public policy but instead merely apply the principle to the factual circumstances when the same fact presents itself, it was submitted that the court may only apply or extend *Merong Mahawangsa* if the public policy underlying the principle may be applied to the introducer agreement. And that the harmful qualities of "influence peddling" on the public are indisputable, before the object or consideration of the introducer agreement offends public policy.

[56] In response to these arguments, learned counsel for the respondent had taken the position that the introducer agreement is illegal, immoral and against public policy. It is pure and simple that it is an illegal agreement irrespective of whether the principles in *Merong Mahawangsa* applies or otherwise. The point on illegality was premised on the alleged representation made by the appellant which was submitted to be influence peddling hence to be illegal by the respondent, within the meaning of s. 24 of the Contracts Act for the following reasons. Firstly, it is a way of circumventing the tender process which CRBC was embarking on. The respondent was keen to participate in the tender process for the sub-contract works involving a Government project and the representation made by the appellant that he was able to influence the management of CRBC seemed to be the only consideration provided by the appellant in the introducer agreement.

[57] The respondent also raised a point that the remuneration of the appellant was simply based on him artificially inflating the price to create the difference to entitle him to be paid under the introducer agreement. Also in contention was the conduct of the appellant in meeting the representative of CRBC, Mr. Felix Ling, who eventually agreed on the marked-up quotation made by the appellant and had thereby compromised the tender process.

[58] It was also the submission of the respondent that the introducer agreement is in pith and substance an agreement with the sole objective of favouring insider treatment in a situation of a tender process for an award of the sub-contract. Thus it was the core contention of the respondent that the only purpose or object of the introducer agreement was the sale of influence

or influence peddling where the consideration was solely based on the art of inflating the price to a higher amount so as to ensure that the clause on the consideration will benefit the appellant. Such an agreement according to the respondent must be illegal, immoral and against public policy. Cited in support was the long line of decided cases in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21, *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281 and *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503.

Decision On Illegality

[59] The written terms of the introducer agreement do not contain any clause on influence peddling. Clause 13 as well as ss. 91 and 92 of the Evidence Act 1950 would exclude any reliance on any purported representation on the part of the appellant citing the decision of this court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 in support. I have carefully perused and analysed the introducer agreement. Bearing in mind that it is a written agreement, the rule of interpretation of it, is well settled. Once a contract is reduced to writing it must be read within its four corners without more. Also ss. 91 and 92 of the Evidence Act would exclude any reliance on any purported representation on the part of the appellant. This court had in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* (*supra*) held that when the terms of an agreement are reduced to writing, s. 92 specifically excludes evidence to contradict, vary or add to the written agreement except in situations provided in the provisos to that section. The legal position is trite in this area of the law (see *Donald James Rae & Anor v. Bruno Sorrentino & Other Appeal* [2014] 1 LNS 1102 and *Nortel Networks (Asia) Ltd & Ors v. Sapura Holdings Sdn Bhd and Anor* [2012] 8 CLJ 296).

[60] It is also significant to note that the introducer agreement also contains an entire agreement clause which estopped the respondent from relying on any purported representation by the appellant, outside the scope of the agreement. The entire agreement clause in cl. 13 states clearly that:

> This Agreement contains the full and complete understanding between the Parties and supersedes all prior arrangement, agreement and understanding, whether written or oral appertaining to the subject matter of this agreement and may not be varied by an instrument signed by all parties.

[61] This court in *Berjaya Times Square Sdn Bhd v. Twingems Sdn Bhd & Anor & Another Case (No 2)* [2012] 1 LNS 166; [2012] 9 MLJ 510 had dealt with the entire agreement clause in a tenancy agreement, to hold that such clause binds the defendant in that case and thereby was prevented to raise the defence of misrepresentation. The Court of Appeal had also dealt with this

clause in *Bank Perusahaan Kecil & Sederhana Malaysia Berhad v. Iskandar Zulkarnain Zainal Abidin* [2013] 1 LNS 308 and had denied a defence of misrepresentation on the basis of the entire agreement clause (see also *Hairin Corporation Sdn Bhd v. Rimbun Tekad Premix (Terengganu) Sdn Bhd* [2016] 1 LNS 424; [2016] 3 MLJ 782).

[62] In my view and having regards to decided authorities, the alleged representation by the respondent therefore cannot form part of the introducer agreement. With cl. 13 in place, we are in no position to read into the introducer agreement any other obligations than what is written in cl. 4. The implication of the entire agreement clause means that no extraneous evidence may be considered to interpret, to supplement or to contradict the appellant's obligations as set out under cl. 4.

[63] Having found so, I agree with the appellant's counsel that the introducer agreement being a written agreement, disentitles the parties to import any other terms to be read into it. Thus the introducer agreement, as it stands is not a contract of selling influence or influence peddling and would not come within the ambit of a contract offending public policy under s. 24 of the Contracts Act.

[64] The respondent is estopped from making allegation of representations prior to the signing of the introducer agreement to be read into the introducer agreement. The respondent is not permitted by law to introduce unwritten terms or obligations to the introducer agreement in light of ss. 91 and 92 of the Evidence Act 1950. The scope of work as spelt out demonstrates the appellant's obligations and cannot be construed as having been to utilise his alleged influence or connections with CRBC to secure the project.

[65] The decision of the High Court as affirmed by the Court of Appeal, in my view, had erroneously accepted the alleged representation as part of the introducer agreement without overcoming the legal impediment of the entire agreement clause as well as ss. 91 and 92 of the Evidence Act. Both courts had not explained how the alleged representation made by the appellant if at all, can form part of the introducer agreement to constitute illegality in the first place, before even applying the principles enunciated in *Merong Mahawangsa*.

Misapplication Of *Merong Mahawangsa*

[66] The reliance on the alleged representation was wrong in law. Because of this misapprehension, the case had been derailed to delve on the question of illegality which was unnecessary in the first place. Even in dealing with the illegality issue, the courts below once again misapplied the principle of law on illegality. As a result, considerable amount of time had been spent at all levels on the principle of illegality decided in *Merong Mahawangsa*, which eventually led to the leave question allowed by this court. It was also canvassed before us at great length. Reference must now be made to *Merong Mahawangsa.*

[67] At the High Court, the claim against *Merong Mahawangsa* was allowed and it was affirmed by the Court of Appeal. The Federal Court however overruled the decisions of the courts below. The leave question posed in respect of which the leave to appeal was granted is as follows:

> Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under section 24 of the Contracts Act 1950 and is therefore void?.

[68] The simple fact in *Merong Mahawangsa* was that the appellant had requested the respondent to render the service to procure and secure the award of a Government contract for the construction of a bridge to replace the Johore-Singapore causeway. The procurement of the bridge project was promised to the appellant therein on the basis of the respondent's close relationship with a member of a Cabinet in the Federal Government. The promise between them was translated into a letter of undertaking where a price consideration of RM20 million would become payable upon the respondent rendering the said service.

[69] After some laborious discourse and the perusal of the list of cases from various jurisdictions, the question was answered in the affirmative. As a result, the contract was found to be void pursuant to s. 24(e) of the Contracts Act and the respondent failed to obtain the consideration of RM20 million as agreed.

[70] In *Merong Mahawangsa* the essence of the subject matter in discussion was the object and consideration of the agreement between the parties which was nothing but a sale of influence on the Government authority to obtain a Government contract. In that judgment, this court had traced the influence peddling as a public policy rule to the decision in *Montefiore v. Menday Motor Components Company, Limited* [1918] 2 KB 241, *Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd* [1988] 1 QB 448 and *Tekron Resources Limited v. Guinea Investment Company Limited* [2003] EWHC 2577 (QB).

[71] I have perused each of the cases referred to by this court in *Merong Mahawangsa* as submitted by the appellant, to appreciate the underlying public policy involved in the respective cases. I begin with the Canadian case of *R v. Cleary* [1992] NSCO 43. In that case, Mr. Cleary offered his service to obtain a tender from the Government of Canada. Mr. Cleary was found guilty under the Canadian Criminal Code for making that agreement because pursuant to that Criminal Code, it would be an offence for a person to pretend that he has influence with the Government and would accept a benefit in return for any cooperation, assistance or an exercise of influence.

[72] There was also a list of English decisions referred to in *Merong Mahawangsa*. The case of *Tekron Resources Limited v. Guinea Investment Company Limited* (*supra*) was a decision of the English Court where the appellant therein acted as an intermediary to procure the award from the Guinean Government for the benefit of the respondent. There was an issue on the contravention of the Guinean criminal law. It was a crime to procure official or governmental influence in exchange for payment. The court, however, found payment under the agreement claimable by distinguishing between influence *per se* and the sale of influence.

[73] In *Montefiore v. Menday Motor Components Company, Limited* (*supra*), the claimant was a member of the imperial air fleet committee which engaged the air board to provide funding to the defendant. On the facts, the judge found that the plaintiff had received a commission for using his position and the value of his good words and getting Government assistance in money or contracts. It was held that it was contrary to public policy for a person to be hired for valuable consideration when he had access to use his position to procure a benefit from the Government.

[74] Besides the above line of cases, there were also cases involving common law determination on public policy for the purposes of avoiding a contract referred to in *Merong Mahawangsa*. The English Court of Appeal in *The Bunga Melati Dua* (*supra*), referred to Lord Atkin's guidance in *Fender v. Mildmay* (*supra*) where Lord Atkin sitting in the House of Lords held that, "… public policy is always an unsafe and treacherous ground for legal decision …" and reminded that the doctrine should only be invoked in clear cases in which the harm to the public would be "substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds".

[75] After referring to the earlier decisions on the subject, Lord Atkin observed and made clear in that decision that the court must remain vigilant not to transgress into the area reserved for the Legislature. Lord Atkin was referring to the earlier case of *Agerton v. Earl Brownlow* (*supra*).

[76] There are also pre-Civil Law Act 1956 *dicta* which are binding on the Malaysian courts as listed out by learned appellant's counsel. First, in the case of *Egerton v. Earl Brownlow* (*supra*) by the House of Lords. Through Parke B at pp. 124 it was held that "… public policy is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments." It was also observed in the case that "… the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions …" of earlier precedents.

[77] In *Rodriguez v. Spever Brothers* (*supra*) Lord Parmoor sitting in the House of Lords reminded that in considering a rule of law founded on public policy, care must always be taken not to introduce a new principle which, to be valid, would require the sanction of the Legislature. This important limitation must be maintained as it would be beyond the jurisdiction of a court to simply determine matters of public policy.

[78] I have also considered the basis of illegality as argued and expounded at para. 67 of the written submission by learned counsel for the respondent. To our minds, the grounds cited by learned counsel failed to focus on the principle of public policy as enunciated in all the decisions referred to on the subject. The grounds relied upon such as the possibility of circumventing the tender process, on the factual matrix of this case, failed to reveal the harmful effect or the public injury that the introducer agreement would have.

[79] The cited cases such as *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn Bhd* (*supra*), *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* (*supra*), are not cases related to s. 24(e) but very much cases on s. 24(a). Hence they are of no assistance to elucidate the meaning of public policy consideration confronting us.

[80] It appears to me that the underlying principle of public policy in those cases was that, an agreement for the sale of influence on a Government authority offended public policy because such an agreement inevitably engendered corruption. Applying the principle it was clearly observed in *Merong Mahawangsa* by Jeffrey Tan FCJ at para. [74] of the judgment that:

> Section 24 is a codification of the English Common Law. Therefore, it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government, as the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest.

[81] Learned author in *Cheshire and Fifoot's Law of Contract* (8th edn), at p. 322 had made the following observations on this subject:

> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.
>
> Secondly, even though the contract is one which *prima facie* falls under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case [1939] AC 1, 'should only be invoked in clear

> cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds … In popular language … the contract should be given the benefit of the doubt.

[82] It is to be observed that s. 24 deals with such consideration and objects of a contract as are unlawful and therefore illegal. This section is in *pari materia* with s. 23 of the Contracts Act of India. The meaning of public policy was explained by learned author in *Pollock and Mulla on the Indian Contract Act and Specific Relief Act* (10th edn) as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. In its commentary on s. 23 under the heading 'Opposed to Public Policy' it was observed that:

> The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. … it is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy.

[83] In my view, it is clear that the principle of law on public policy decided in *Merong Mahawangsa* may only be applicable if the public policy underlying an agreement can be applied by analogy to the introducer agreement, and if the harmful qualities of influence peddling in this case to the Malaysian public are indisputable.

[84] Thus, what must be borne in mind is that a judge is not free to speculate upon what, in his opinion, is good for the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law. And not hold any contract illegal unless its harmful qualities are indisputable.

[85] The High Court as well as the Court of Appeal, had wrongly applied the principle of *Merong Mahawangsa* because it was done without any analogy to the underlying principle of public policy enunciated in that case. Instead, the basis of applying it was purely by making a finding that the introducer agreement had a strong and inextricable nexus with the project of the Government. This was clearly reflected in the judgment below:

> In our case, the Government's involvement was regarding the building of the project. It was submitted by counsel for the Plaintiff that the main contract had been signed between BLT and MITISA.

> Therefore the Introducer Agreement would not involve the Government. With due respect, I don't agree with that view. When prices were marked up at sub contract level to enable the Plaintiff to be paid RM4,276,027.10 as provided in Clause 6 of the Introducer Agreement, it would follow that it would result in lower quality and shoddy workmanship as well low quality materials. This means that the building would need repair and the Government and the taxpayer would have to pay. So it is not true that the Government would not suffer.

[86] The Court of Appeal had also echoed similar observation and had made the following observation in para. [54] of the judgment:

> … Since the primary object of the Agreement was that the plaintiff would use his influence ("influence peddling") to procure the sub-contract in respect of a public interest Project, we consider that the Agreement is void as being in contravention of public policy, according to the principle in *Merong Mahawangsa*'s.

[87] Quite clearly from the above-quoted paragraphs that both the High Court and the Court of Appeal had wrongly applied *Merong Mahawangsa* on the basis that the introducer agreement was underpinned by the project which was expended on taxpayer's funds. Whilst the High Court found that the current appeal fell squarely on all fours with *Merong Mahawangsa*, the Court of Appeal disagreed as it was found that the influence peddling in the present appeal was not used directly on the Government authority but on CRBC, a private entity. That notwithstanding, the Court of Appeal nevertheless held the same view that the introducer agreement was an agreement within the scope of s. 24(e) and within the principle in *Merong Mahawangsa* due to the presence of the public interest element.

[88] There is no legal basis for the courts below to apply *Merong Mahawangsa* to the introducer agreement. *Merong Mahawangsa* was decided upon its set of facts where it was clear that private influence peddling is entirely harmful to the Malaysian public. In this regard, both the trial court and the Court of Appeal had purported to speculate on the public injury which would be brought upon by the introducer agreement.

[89] The harmful effect deduced by the High Court as affirmed by the Court of Appeal was not grounded on any evidence or any legal deduction.

[90] The harmful effect as explained by the High Court that, when prices were marked up to enable the appellant to be paid a hefty consideration, that would translate into poor quality of work, which was accepted by the Court of Appeal, was pure conjecture. This is not the kind of harm to the public which is not indisputable. It may be true that the introducer agreement bears close nexus with a Government funded project. But that is not sufficient to strike it down as being illegal contrary to s. 24(e).

[91] It cannot be overemphasised that an agreement by way of sale in public office tend to prejudice the public service by interfering with the selection of the best-qualified persons or services. Such sales are therefore, unlawful and void. It bears repetition however based on the law expounded on determining public policy, it is never the duty of a judge to speculate or opine on the pros and cons of influence peddling over a private party to obtain a private contract, because it is within the domain of the Legislature to determine and to provide for it by proper enactments. The court is to only expound the law, either the written law from statutes, or the unwritten law from common law or text-writers of acknowledged authority, and upon principles clearly deduced from them by sound reasons and just inference.

[92] As to what constitutes public injury is not immutable since it varies and changes with societal changing needs. Very often the Legislature fails to keep pace with the change or provide for all eventualities. It is obligatory on the court to step in to fulfill any of such lacuna. The court must not lend its hand and, in consonance with public conscience and public welfare, must intervene in the exercise of freedom of contract, which brings harm to society or causes public injury. While doing so the court cannot lose sight of the long-established principles as earlier decided.

[93] It is clear that the underlying public policy in *Merong Mahawangsa* merely relates to public policy where the sale of influence peddling is directly on the public authority to obtain a Government contract. Since it is a doctrine of common law, it must be governed by earlier pronouncements by the court. The list of cases referred to by *Merong Mahawangsa* had also been premised on that same principle.

[94] This head of public policy had been identified in *Merong Mahawangsa* as the sale of an influence of a Government official where it was very clearly stated in the judgment of this court in that case at para. [58]:

> But there should be no difficulty to place to which head of public policy applies to a contract for the sale of influence, for it is 'a recognised head of English public policy **that the court will not enforce a contract for the sale of influence** particularly where the influence is to be used to obtain contracts or other benefits from persons in a public position: (emphasis added)

[95] I therefore find it clear that the contract for the sale of influence peddling of a public authority is the established head of public policy in English law as applied in Malaysia in *Merong Mahawangsa*.

[96] The respondent had not established what was the clear and harmful effect that could be deduced from such an act of circumventing that tender process. On the factual matrix of this case, unlike that in *Merong Mahawangsa*, I am not able to infer that the introducer agreement may

engender corruption, or any other clear harmful effect on the Malaysian public. I reiterate the reminder by Lord Atkin in the leading case on the subject in *Fender v. St. John Mildmay* that the doctrine of public policy 'should only be invoked in clear cases in which the harm to the public is substantially incontestable'.

No Clear Evidence On Peddling

[97] The other aspect of *Merong Mahawangsa* is this. That the object of the agreement to procure the award of the Government project was supported by substantial and cogent evidence, including the admissions by the relevant parties. Whereas the alleged influence peddling in the present appeal is not even stated in the introducer agreement. In any event as alluded to earlier, the introducer agreement does not contain any clause on influence peddling. There is therefore no cogent evidence in support of such peddling. This is yet another reason why *Merong Mahawangsa* cannot apply to the introducer agreement.

[98] Concluding my deliberations on the issue of illegality, I agree with the appellant that the Court of Appeal was in clear error in invoking public policy to invalidate the introducer agreement on both aspects. First the alleged influence peddling is not supported by clear evidence as required in the test propounded by *Merong Mahawangsa* and the alleged public policy against influence peddling in this case, is not indisputable and not established as absolutely harmful to the Malaysian public. On both scores, the introducer agreement therefore cannot be invalidated under s. 24(e) of the Contracts Act. Hence there was no basis to rely on the principle of law on public policy as established in *Merong Mahawangsa*, to hold that the introducer agreement is illegal. In view of the facts and circumstances of the case, I decline to answer the leave question posed. In this regard, my learned brothers Justice Ahmad Maarop (PCA) and Justice Azahar Mohamed have read this judgment in draft and have expressed their agreement with my views that it is unnecessary to answer the leave question posed.

No Finding Of Facts

[99] In concluding that the appellant had failed to prove his claim, the trial court went on to construe cls. 5, 6 and 7 of the agreement and concluded that the appellant had failed to prove his claim. The trial judge was clearly wrong to conclude that the appellant had failed to prove his case by construing the respective clauses. This is clearly reflected at pp. 37 and 38 of the grounds of judgment where it was stated that:

> I interpret the above clause to mean that the main bulk of the work was done by the Defendant and the Plaintiff's contribution was to revise upwards the price into what is called a Second Quotation.
>
> …
>
> I am of the opinion that the Plaintiff had not proven that he is entitled to the claim as in his prayers in the statement of claim.

[100] The Court of Appeal too did not deal with the matter and made no finding on the performance by the appellant of his obligations pursuant to cl. 4 of the introducer agreement. This was made clear in para. [32] of its judgment below:

> Should we decide on the threshold issue in the affirmative, the effect would be that the Agreement is null and void *ab initio* and thus there would not arise the other issues on appeal stated above, as a contract which is void for illegality confers no rights or obligations on the parties thereto.

Despite the above statement, the Court of Appeal had affirmed the judgment and the order made by the High Court, which also includes the finding that the appellant had failed to prove his case and that he was not entitled to the claim. The Court of Appeal had further erred in affirming that part of the High Court decision without deliberating on the matter.

[101] Upon reversing the order of the Court of Appeal on the issue of illegality, I am now faced with what remained to be decided as to whether the appellant had made out its claim against the respondent on its merits. In the statement of claim, the appellant claimed the sum of RM4,276,027 pursuant to cl. 6 of the introducer agreement or alternatively any increased or decreased consideration sum pursuant to cl. 7(c) of the introducer agreement plus interest.

Facts Finding By Appellate Court

[102] Before I embark on dealing with this part of the judgment, I am mindful of the role of the appellate court in undertaking finding of facts not made by the courts below. In this regard, it would be appropriate for me to refer to the decision of the Federal Court (Singapore) in *Wah Tat Bank Ltd & Ors v. Chan Cheng Kum & Ors* [1967] 1 LNS 203; [1967] 2 MLJ 263 on this issue. In that case, the trial judge made no findings of fact though a considerable number of witnesses were called to prove the existence or non-existence of the alleged custom or usage of the trade involved in that case. A retrial order was made for the disputed issue to be determined. Wee Chong Jin CJ made the following observation in doing so:

> … I might have felt disinclined, sitting on an appellate court, to attempt to do so except that the counsel for both parties agreed that all available evidence appears in the record, that the credibility of the witness who gave evidence on the usage … and that all the circumstances of the case, none of the parties would suffer any injustice if this court should deal with this issue of facts.

[103] Similar observations were made in the Privy Council case from Jamaica in *Chin v. Audrey Ramona Chin (Jamaica)* [2001] UKPC 7 where Lord Scott of Foscote observed that:

> … The normal and proper function of an appellate court is that of review. An appellate court can within well-recognised parameters, correct factual findings made below. But where the necessary factual findings have not been made below and the material on which to make those findings is absent, appellate court not, except with the consent of parties.

[104] I agree with the above observations and we hold the view that the appellate court should not attempt at making any finding of fact which the court below failed to do. However, the exception being that both parties have agreed to it. Learned counsel of both parties had in their submissions before us, focused very much on the issue of illegality. However, in their written submissions, parties had submitted and invited this court to address on the performance of the introducer agreement by the appellant while acknowledging that both the courts below had failed to address or made the necessary findings of facts on the same. By this consensus, I proceed to deliberate on the performance of the introducer agreement by the appellant.

The Claim Of The Appellant

[105] To recapitulate, in dealing with this part of the appeal, I am mindful that, stripped off any representation on influence peddling, the obligations of the appellant must be strictly construed upon the written terms as spelt out in the introducer agreement. It was submitted that the appellant had performed all the obligations as stipulated in cl. 4. Hence the appellant is entitled to the payment as agreed thereunder. The pleaded defence by the respondent was by placing reliance on representations made by the appellant prior to the written agreement is excluded under the law.

[106] Alternatively, it was the defence of the respondent that, the appellant had failed to carry out his obligations in the introducer agreement because ultimately the respondent obtained the project from CRBC through its own effort and that the price for the project procured by the respondent was lower than even the first quotation. The respondent claimed that the contract was obtained through its own initiatives, without the assistance of the appellant.

Decision On Liability (Dissenting)

[107] The second part of the appellant's appeal was premised on the failure of the trial judge as well as the Court of Appeal, to make finding of facts as to whether the introducer agreement has been performed by the appellant. I have carefully scrutinised the introducer agreement. In summary, the introducer agreement under cl. 3 creates an obligation on the respondent to submit a quotation which the respondent did. It is described as the first quotation. The appellant is obligated to revise the first quotation, which the appellant did and is described as the second quotation, for onward submission to CRBC. The other obligations of the appellant are spelt out in cl. 4 which constitutes, advising, negotiating and facilitating information

regarding the revision of the first quotation, compiling all relevant documentation required for the respondent to submit the revised quotation, assist, liaise and work with CRBC in matters leading to obtaining the tender of the project. And finally to assist in securing the award of the project to the respondent by CRBC. This is followed by cl. 5 which says, the validity of the introducer agreement shall be dependent on the award of the project to the respondent by CRBC.

[108] Then, there is the payment clause. The consideration agreed for the initiatives of the appellant is as per cl. 6, which is the differential sum between the revised quotation (second quotation) at RM35,369,505.25 with the first quotation of RM31,093,478.15, amounting to RM4,276,027.10. Then there is cl. 7(c) which states that:

> In the event where there is an increase or decrease that shall effect the total Consideration sum due to the Introducer by virtue of Clause 6 above, the difference shall be either added on or deducted. In accordance with Clause 6 above and progressively as described in Clause 7(a) above.

Though it was agreed under cl. 6 that the consideration payable is RM4,276,027.10, cl. 7(c) allows for adjustment of the said sum in contemplation of the variation of the quotation accepted by CRBC.

[109] Now in evidence, tracing back the background and the chronology of events, the relationship between parties started when the appellant made his first contact with CRBC at a meeting on 25 January 2007. At that meeting, the appellant met Mr. Hu Bin, Mr. Felix Lim and Encik Mohd Johari of CRBC and Generasi Tangkas. That was when the appellant discovered about the project. The appellant then approached the respondent who became interested in some sub-contract work from the project.

[110] Thereafter, the appellant continued to work with the respondent which led to a revision of the first quotation prepared by the respondent. There was evidence of communications between parties on the revision of the quotation, through various emails. Meetings were also held by the appellant on behalf of the respondent with CRBC over the quotation, which eventually led to a letter of appointment issued to the appellant appointing him as introducer and the signing of the introducer agreement between them.

[111] The appellant testified that he had fulfilled all the obligations pursuant to cl. 4 in the following ways:

(i) the appellant said he took a concerted effort to vet and approve a candidate for CRBC to consider as a possible sub-contractor for the structural sub-contract works in respect of the project;

(ii) without his assistance, the respondent did not even know of the project nor took any step to bid for the project on its own accord;

(iii) the appellant provided services in liaising with the representative from CRBC to obtain the necessary information to prepare the necessary quotations and bid;

(iv) the appellant reviewed, cross-checked and verified all the initial quotations provided by the respondent before submitting to CRBC for approval. There were the first revised quotation submission, second revised quotation submission, third revised quotation submission, fourth revised quotation submission and fifth revised quotation submission;

(v) the appellant provided his assistance and services in ensuring that the respondent was provided with a letter of intent in respect of the project.

[112] The evidence both in terms of the contemporaneous documents in the various email communications, as well as the oral evidence of the appellant revealed the efforts and initiatives undertaken by the appellant in carrying out his obligations under cl. 4. The respondent's witnesses particularly Mr Ling Sing Hock (DW1), Mr New Chee Pheng (DW2) and Mr Wong Yih Ming (DW3) in the course of the trial supported the above contentions by the appellant.

[113] DW1 admitted that the appellant was the point of contact to the respondent in dealing with CRBC. In fact, it was the appellant who communicated with CRBC on behalf of the respondent. According to DW1, he was not in direct discussion with CRBC and all discussions with CRBC were conducted by the appellant on behalf of the respondent. DW3 agreed that the appellant was the one working with CRBC on the second quotation. It was further admitted by DW1 that, before the appellant came into the picture, he had never submitted or bid for structural work to CRBC, not being aware of the project.

[114] In total, prior to the signing of the introducer agreement, the appellant had submitted revised quotation to CRBC as early or even before 5 May 2008. The quotation submitted were rejected by CRBC again and again on 10 July 2008, 2 September 2008 and 19 November 2008. Each of the submissions to CRBC was rejected. It was only on 4 December 2008 that the letter of intent appointing the respondent was issued. The letter of intent referred to both structural and architectural at RM61,000,000. This appears to be in tandem with the fact that prior to that, on 24 November 2008 Mitisa was awarded the structural and architectural to CRBC. It was also in evidence that right after the issuance of the letter of intent, there were instructions to commence work made by CRBC to the respondent on 5 December 2008.

[115] The issuance of the letter of intent by CRBC to the respondent, the appellant contended, had indeed fulfilled what cl. 5 contemplates. All the appellant needs to show is that the contract work was awarded to the respondent. It is beyond dispute that the respondent had eventually been awarded the contract which constituted both the structural works covered by the first quotation and the revised second quotation and besides, the architectural work.

[116] It is also in evidence that since the letter of intent was issued, the respondent then communicated directly with CRBC to the exclusion of the appellant. The respondent did not update the appellant of any further progress. When the purported letter dated 19 November 2008 rejecting the second quotation was issued, the respondent did not even notify the appellant to enable any remedial measure to be taken. The respondent never informed the appellant on the cancellation of the letter of intent of 4 December 2008 made by CRBC, purportedly by another letter dated 19 November 2008.

[117] On 22 November 2008 the respondent on its own, submitted a new quotation of RM61,688,966.25 for structural and architectural works without any notice to the appellant since they were then in direct communication with each other at the exclusion of the appellant. It is the appellant's case that the respondent had bypassed the appellant and directly dealt with CRBC to avoid payment under the introducer agreement.

[118] Having given my considerations to the evidence as appeared in the appeal records, we agree with the appellant that on evidence, the appellant had demonstrated clearly how he had fulfilled his obligations under cl. 4. These contentions were not denied by the respondent in evidence.

[119] The only defence raised by the respondent was premised on the fact that the award of the sub-contract made to the respondent was through no effort or initiative of the appellant, but it was on the respondent's own initiative. But, I do not find anything in the introducer agreement that can be construed that the appellant guaranteed the sub-contract would be awarded to the respondent by CRBC. In this regard, cl. 4 imposes obligations on the appellant to only assist in securing the award of the project to the respondent by CRBC. These are the clear bargain between parties.

[120] From the evidence as appeared in the appeal records, I am in agreement with the appellant, that he had fulfilled his obligations as spelt out under cl. 4 of the introducer agreement. The provisions in the introducer agreement in so far as the appellant's entitlement to his remuneration is found in cl. 6. Clause 7(c) specifically provides that the consideration sum may vary depending on the actual sum for which the respondent would ultimately be awarded the project. In the event where there is an increase or decrease

A that shall affect the total consideration sum due to the introducer by virtue of cl. 6 above, the difference shall be either added on or deducted. The respondent ultimately secured the project for a sum of approximately RM58.6 million which includes both the structural and architectural works.

B **[121]** I further agree with the appellant that cl. 5 had already been fulfilled when the respondent was given the letter of intent. The argument of the respondent was that since the respondent was not awarded with the sub-contract based on the second quotation, cl. 5 had not been met, that goes against the clear wording of that clause.

C **[122]** Having said that, in the circumstances of the case, the appellant would not be paid under cl. 6 but under cl. 7(c). Even though the respondent ultimately secured the project for a sum of approximately RM58.6 million, it is not disputed that the contract awarded includes the structural work which is the subject matter of the introducer agreement. Thus I agree with the appellant that the amount to be paid to the appellant is in accordance with
D cl. 7(c) and not cl. 6.

[123] In computing what actually was the contract sum for structural work, DW3 prepared two summaries. The first summary was then withdrawn on the rebuttal made by the appellant's witness PW3 alleging manipulation of
E the figures to defeat the claim of the appellant. PW3 was a quantity surveyor with the Government Department (JKR) who had since retired after 35 years.

[124] Now in the second summary, DW3 was questioned in cross examination on how he had arrived at the figure for structural work as only
F RM29,174,180.42 excluding preliminaries. He first testified that he obtained the figures based on the bill of quantities which he admittedly said that they were not before the court.

[125] In the end, DW3 admitted to the various figures in his testimonies below:

G PC You agree that based on your calculation that the contract awarded for the structural work by CRBC to Gainvest is RM34,455,367.70? Based on your document you prepared.

DW3 Yes

H PC You agree that RM34,455,367.70 minus RM31.093.478.15, give me the figure.

DW3 RM3,361,889.55

PC You agree that based on the terms of the Introducer Agreement that would be the sum due to the Plaintiff, Isn't that correct?

I DW3 Yes

[126] As such, the appellant in my view should be entitled to the difference between the first quotation ie, RM31,093,478.15 and the actual sum awarded to the respondent for the structural work only. DW3 in evidence had agreed that the award on structural work to the respondent was based on the sum of RM34,455,367.70. In view of the above evidence, I hold the view that the respondent is liable to pay the appellant the sum of RM3,361,889.55 pursuant to cl. 7(c) together with costs and agreed interest of 10% as per cl. 8(c) from date of filing, until judgment date and thereafter judgment interest of 5% until full settlement.

[127] I would therefore have allowed this appeal with costs.

[128] This judgment is made pursuant to s. 78 of the Courts of Judicature Act 1964 due to the retirement of Justice Zaharah Ibrahim Chief Judge of Malaya and Justice Alizatul Khair Federal Court Judge.